

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2006 Session

**JOSEPHINE BURCHFIEL, ET AL. v. GATLINBURG AIRPORT
AUTHORITY, INC., ET AL.**

**Appeal from the Circuit Court for Sevier County
No. 2003-396-I Ben W. Hooper, II, Judge**

No. E2005-02023-COA-R3-CV - FILED NOVEMBER 28, 2006

The plaintiffs filed this trespass action against the defendants, Gatlinburg Airport Authority, Inc. (“the Airport Authority”) and Tennessee Museum of Aviation, Inc. (“the Museum”), seeking injunctive relief and damages as a result of the defendants’ construction of a sign within a right-of-way conveyed by the plaintiffs to the Airport Authority. The trial court granted summary judgment to the plaintiffs, ordering the defendants to remove the sign. The defendants appeal. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Ronald E. Sharp, Sevierville, Tennessee, for the appellant, Gatlinburg Airport Authority, Inc.

Danny P. Dyer, Knoxville, Tennessee, for the appellant, Tennessee Museum of Aviation, Inc.

C. Dan Scott and Melissa Edwards, Sevierville, Tennessee, for the appellees, Josephine Burchfiel, Norman Burchfiel’s Family Trust, and GST Exemption Marital Trust.

OPINION

I.

The plaintiffs own real property acreage fronting on Dolly Parton Parkway in Sevierville. In 1998, the Airport Authority acquired approximately 23 acres of this property by condemnation. The plaintiffs retained certain property at this location and conveyed an “access and utility” easement to the Airport Authority across a portion of the property they retained. The deed conveying the easement provides, in pertinent part, as follows:

. . . [I]n order to establish a 50[-]foot right of way of ingress and egress to and from the property of the [Airport] Authority and Dolly Parton Parkway, the [plaintiffs] have agreed to grant to the [Airport] Authority a 25[-]foot right of way which will comprise the Eastern portion of the 50[-]foot right of way;¹

* * *

. . . [the plaintiffs] do hereby give, grant and covey unto [the Airport Authority] a 25[-]foot perpetual, non-exclusive access and utility easement for ingress and egress to and from property owned by the [Airport] Authority and Dolly Parton Parkway,

* * *

It is the intention of the parties hereto to create this access and utility right of way for the benefit and use of the [Airport Authority's] property, and it is understood and agreed that said right of way may be used by the [Airport] Authority for an access and utility right of way in support of its operation of an airport facility or any other purpose.

(Footnote added). The Airport Authority subsequently leased a portion of the 23-acre property to the Museum, a non-profit Tennessee corporation. The Museum constructed and opened a historical museum on the site.²

On April 22, 2002, the Airport Authority sent a letter to the City of Sevierville Planning Commission, requesting, on behalf of itself and the Museum, permission to erect a sign within the right-of-way conveyed by the plaintiffs. The Airport Authority's application to the Planning Commission includes a map of the sign's proposed location, an artist's rendition of the proposed sign, and the exact dimensions of the proposed sign. The letter from the Airport Authority states that, since its opening, the Museum had "experienced significant visitor identity and directional problems and badly need[ed] this signage to assist both visitors and local residents who wish to visit the new [m]useum." The letter further states that the Museum had agreed to share the sign with the Airport Authority when the Airport Authority constructed a new terminal building. The Planning Commission approved the application to erect the sign on May 2, 2002. The plaintiffs were not

¹ The record suggests that the western portion of the 50-foot right-of-way, *i.e.*, the other 25 feet of the right-of-way, is owned by a non-party.

² T.C.A. § 4-1-326(b) (2005) designates this museum and its affiliated Hall of Fame "as the official state repository and archive for aviation history."

notified of the defendants' intention to erect the sign, their application to the Planning Commission, or the latter's approval.

The construction of the sign occurred on or about October 10, 2002, through October 15, 2002. The sign measures approximately 15 feet in height and 8 feet in width. The top portion of the sign, which reads "TENNESSEE Museum of Aviation – WARBIRD COLLECTION," is in the colors of red, white, and blue. The lower portion of the sign consists of a concrete base measuring approximately 9 feet in length and 5 feet in width. Two metal poles connect the top portion of the sign to the concrete base. The plaintiffs first became aware of the sign when Emily B. Kile, the attorney in fact for Josephine Burchfiel, and a beneficiary under Norman Burchfiel's Family Trust, drove by the property as the sign was being erected.

On June 12, 2003, the plaintiffs filed their complaint, seeking (1) to enjoin further construction of the sign, (2) a permanent injunction requiring the removal of the sign, (3) compensatory and punitive damages, and (4) all litigation costs, including attorney's fees. The plaintiffs subsequently filed a motion for summary judgment, asserting, *inter alia*, that the sign constituted a trespass upon their property, and that the court should require the removal of the sign and the payment of damages. The Airport Authority filed a cross-motion for summary judgment, asserting that it was immune from the plaintiffs' suit under the Tennessee Governmental Tort Liability Act ("the GTLA"). The Museum filed its own cross-motion for summary judgment, arguing (1) that the right-of-way conveyed by the plaintiffs expressly and/or implicitly authorized the construction and placement of the sign within the right-of-way, and (2) that the plaintiffs' suit was barred by the doctrine of laches because the plaintiffs waited approximately eight months after they became aware of the existence of the sign before filing suit.

After hearing argument from both sides, the trial court granted the plaintiffs' motion for summary judgment and denied the defendants' motions. The trial court ordered the defendants to remove the sign upon the completion of any and all appeals. The defendants appeal.

II.

The Airport Authority and the Museum raise different issues for our consideration. The issues raised by the Museum are as follows:

1. Whether the trial court erred in failing to find that the property rights conveyed by the plaintiffs via the right-of-way deed included the right to erect a sign.
2. Whether the trial court erred in ordering the removal of the sign.

The Airport Authority raises the following issues:

1. Whether the trial court erred in holding that the Airport Authority was involved in the construction of the sign and had the ability to remove the sign.
2. Whether the trial court erred in failing to find that, pursuant to the GTLA, the Airport Authority was immune from the plaintiffs' trespass suit.

We will address each issue in turn.

III.

Because summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. **Gonzales v. Alman Constr. Co.**, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993). In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. When presented with a summary judgment motion, the trial court "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." **Byrd v. Hall**, 847 S.W.2d 208, 210-11 (Tenn. 1993).

IV.

The Museum principally asserts that the trial court erred in granting the plaintiffs' summary judgment motion because, according to it, the construction of the sign within the right-of-way is an authorized use of the right-of-way. The Museum first contends that the language of the right-of-way deed expressly authorizes the construction of the sign. As an alternative argument, the Museum contends that the deed implicitly authorizes the construction of the sign. The trial court found that the language of the deed was not broad enough to authorize the construction of the sign at issue. We affirm this finding.

"In the construction of instruments creating easements, it is the duty of the court to ascertain and give effect to the intention of the parties." 28A C.J.S. *Easements* § 57 (1996). The intention of the parties with regard to the purpose and scope of an easement conveyed by express grant is determined by the language of the deed. See **Foshee v. Brigman**, 129 S.W.2d 207, 208 (Tenn. 1939) ("If the easement is claimed under a grant, the extent of the easement is determined by the language of the grant."). "[T]he easement holder's use of the easement must be confined to the purpose stated in the grant of the easement." **Columbia Gulf Transmission Co. v. The Governors Club Prop. Owners Ass'n.**, No. M2005-01193-COA-R3-CV, 2006 WL 2449909, at *3 (Tenn. Ct. App. M.S., filed August 21, 2006). The case of **Adams v. Winnett**, 156 S.W.2d 353 (Tenn. Ct. App. 1941),

provides the following additional guidance for determining whether an easement holder's use of an easement is proper:

“The use of an easement must be confined strictly to the purposes for which it was granted or reserved. A principle which underlines the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden.”

* * *

“It may be said in general that if an easement is put to any use inconsistent with the purpose for which it was granted, the grantee becomes a trespasser to the extent of the unauthorized use.”

* * *

“Where [an] easement is not specifically defined, it need be only such as is reasonably necessary and convenient for purpose for which it was created.”

Id. at 357-58 (citations omitted); *see also H.B. Henry v. Tennessee Elec. Power Co.*, 5 Tenn. App. 205 (Tenn. Ct. App. 1927) (finding that the deed's specific language conveying a utility right-of-way did not authorize the easement holder to erect a transformer within that right-of-way); *City of Jackson v. Walker-Hall, Inc.*, No. W2004-01612-COA-R3-CV, 2005 WL 1834114, at *8 (Tenn. Ct. App. W.S., filed August 3, 2005) (finding that the easement holder's use of a utility right-of-way as a staging area for a road construction project exceeded the scope of the easement).

The purpose behind the easement at issue is specific and unambiguous. The parties intended to grant the Airport Authority a right-of-way for ingress and egress to and from the property it had acquired by condemnation. The deed expressly states that its purpose is “to establish a . . . right of way of ingress and egress to and from the [Airport Authority's] property.” The deed also consistently describes the easement as an “access and utility easement” for “ingress and egress.” Nowhere in the easement is there a reference to the construction of a sign.

The Museum asserts that the following language from the right-of-way deed expressly authorizes the construction of the sign:

It is the intention of the parties hereto to create this access and utility right of way for the benefit and use of the [Airport Authority's] property, and it is understood and agreed that said right of way may be used by the [Airport] Authority for an access and utility right of

way in support of its operation of an airport facility *or any other purpose*.

(Emphasis added). The Museum construes the “or any other purpose” language to authorize use of the right-of-way for access, utilities, “or any other purpose,” including the construction of the sign. We disagree with this interpretation. The “or any other purpose” expands the language “in support of its operation of an airport facility”; it does not expand what the right of way can be used for. The deed therefore reads that the Airport Authority can use the *access and utility right-of-way* in support of its operation of an airport facility or in support of any other purpose. In other words, it permits the Airport Authority to use the access and utility easement for ingress and egress even if it decides to use its property for a purpose other than the operation of an airport facility. The “or any other purpose” language does not authorize the Airport Authority to erect anything that it desires within the right-of-way. *See* 28A C.J.S. *Easements* § 179 (1996) (“The term ‘access’ in the grant of an access easement does not include the right of [the easement holder] to build a structure on the easement.”).

The Museum appears to also argue that the construction of the sign was an authorized use of the right-of-way because the deed did not expressly prohibit the construction of such a sign. In its own words, the Museum states that, “[i]n the absence of language limiting the rights conveyed, the presumption is that the grant of an easement includes whatever rights are reasonably related to its use.” To further support this argument, the Museum cites T.C.A. § 66-5-101 (2004), which provides as follows:

Every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument.

The Museum appears to suggest that we read this provision to support the idea that, when a grantor conveys an easement, the easement holder can use the easement in any “reasonably related” way, unless the deed expressly states that the easement holder cannot use the easement in that way. So the argument goes, because the plaintiffs did not expressly prohibit the construction of the sign, the sign’s construction was authorized.

This argument is flawed. It erroneously assumes that the construction of the sign at issue is “reasonably related” to the defendants’ use of the right-of-way. The construction of the sign in this case is not a reasonable use of an easement granted specifically for ingress and egress purposes. Furthermore, we find that T.C.A. § 66-5-101 is not implicated by the current set of facts. A typical situation in which T.C.A. § 66-5-101 applies is as follows: the grantor conveys certain real property to the grantee; the deed conveying the property expresses that the property is conveyed “in fee simple” or that the grantor “conveys any and all rights” to the property; the grantor or his or her successors-in-interest contend that they have retained a current possessory interest or a future possessory interest (*e.g.*, a fee simple determinable) in the property; T.C.A. § 66-5-101 is applied

for the principle that a deed conveys *all* of the grantor's estate, unless the deed expressly limits the estate or interest being conveyed. See *Cellco P'ship v. Shelby County*, 172 S.W.3d 574, 586-87 (Tenn. Ct. App. 2005); *Thornton v. Countrywide Home Loans, Inc.*, Nos. W1999-02086-COA-R3-CV, W1999-02087, COA-R3-CV, 2000 WL 33191366, at *4-5 (Tenn. Ct. App. W.S., filed October 23, 2000); *Honeycutt v. Price*, No. 03A01-9610-CH-00329, 1997 WL 269472, at *2 (Tenn. Ct. App. E.S., filed May 21, 1997). The easement in the instant case was a "perpetual, non-exclusive access and utility easement for ingress and egress to and from [the Airport Authority's] property."

The Museum next argues that, even if the "or any other purpose" language does not explicitly authorize the construction of the sign, the right to erect the sign is "implicit within the overall purpose and language of the deed." The Museum cites the case of *Mize v. Ownby*, 225 S.W.2d 33 (Tenn. 1949), to support this contention. In *Mize*, the owner of the servient estate sought an injunction ordering the easement holder to remove the cattle guards that the easement holder had constructed across the easement. *Id.* at 34. The issue before the High Court was whether the easement holder had the right to substitute cattle guards for gates. *Id.* The grant creating the easement did not specify the nature of such a barrier. *Id.* The Court noted that there was little difference between cattle guards and gates and that they both achieved the same objective. *Id.* The Court concluded that the easement holder had a right to install and maintain the cattle guards. *Id.* at 35. In so holding, the Court specifically stated that

"[i]t is a general rule that the owner of an easement of way may prepare, maintain, improve, or repair the way in a manner and to an extent reasonably calculated to promote the purposes for which it was created or acquitted, causing neither an undue burden upon the servient estate, nor an unwarranted interference with the rights of common owners or the independent rights of others"

Id. (citation omitted). The Court further noted that, if the cattle guards became "out of repair" or did not adequately perform their function, the owner of the servient estate could request that the trial court restore the gates and require the easement holder to pay any resulting damages. *Id.*

The Museum argues that the construction of the sign at issue was likewise "reasonably calculated to promote the purposes for which [the easement] was created." *Id.* We disagree. The purpose of the easement is clear. It was created to provide the Airport Authority with a means of ingress and egress to and from the property it had acquired by condemnation. The sign at issue is not a logical extension or promotion of this purpose. The sign is large and, according to Airport Manager, Don Baker, "advertises" the Museum. We hold that the deed does not implicitly authorize the construction of this sign.

Lastly, the Museum argues that, even if we were to find that they had no authority to erect the sign, the preponderance of the evidence does not support the trial court's ruling that the sign must be removed. The Museum believes that the sign should not be removed because, as it argues, there was no evidence that the sign interfered with the plaintiffs' use of the property or that the sign

“materially increased” the burden upon the plaintiffs’ property. We hold that such findings with respect to the plaintiffs’ use and burden are unnecessary. The construction of the sign exceeded the authorized uses of the right-of-way; thus, the Airport Authority and the Museum trespassed upon the plaintiffs’ property in erecting the sign. *See Adams*, 156 S.W.2d at 357-58. The trial court, therefore, had the right to order the removal of the sign.

V.

A.

We now turn to the issues raised by the Airport Authority. It argues that the trial court erred in ordering it to remove the sign because the record, when viewed in the light most favorable to the Airport Authority, does not sufficiently establish its involvement in the construction and maintenance of the sign. The Airport Authority concedes that it signed the application to erect the sign that was sent to the City of Sevierville Planning Commission; however, the Airport Authority asserts that the Museum “has complete ownership and control over all other circumstances surrounding the ownership, erection and maintenance of the sign.” So the argument goes, the Airport Authority “does not have the right or ability to provide the equitable relief” awarded by the trial court. We disagree.

First, the Airport Authority’s participation in the construction of the sign is well established by the record. The Airport Authority sent the application to erect the sign to the Planning Commission on its own letterhead. The application is signed by Don Baker, the manager of the Gatlinburg-Pigeon Forge Airport, an airport which is operated by the Airport Authority. The text of the application states that the Airport Authority is requesting the right to erect the sign on behalf of *itself* and the Museum. The application also states that the Museum agreed to share the sign with the Airport Authority when the Airport Authority built its new terminal building. Furthermore, the record includes a copy of the minutes of the Airport Authority’s January 16, 2002, meeting, in which item number five of those minutes states, “Authority asked Don to check with the City of Sevierville about a new airport sign.” This evidence clearly shows that the Airport Authority was substantially involved in the process of erecting this sign.

The Airport Authority’s ability to remove the sign is also well intact. The easement upon which the sign was erected was conveyed by the plaintiffs to the Airport Authority. The fact that the Airport Authority turned around and leased its property to the Museum does not negate the Airport Authority’s right and ability to remove the unauthorized sign.

B.

The Airport Authority also asserts that the trial court erred by failing to grant its motion for summary judgment on the basis that the GTLA, which is codified at T.C.A. § 29-20-101 *et seq.* (2000 & Supp. 2005), shielded it from any liability in this matter. We also find this issue adverse to the Airport Authority.

The GTLA grants blanket immunity to subordinate governmental entities subject to certain statutory exceptions. The Airport Authority particularly relies upon T.C.A. § 29-20-205(2), which states, in relevant part, as follows: “Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of: . . . intentional trespass . . .” The Airport Authority argues that this provision specifically preserves its immunity from claims arising out of intentional trespass, and therefore, it “cannot be liable for damages caused by the erection of the sign.” We disagree with the Airport Authority’s interpretation and application of this provision of the GTLA.

T.C.A. § 29-20-205 removes immunity from governmental entities for injuries “proximately caused by a negligent act or omission of any employee within the scope of his employment.” *Id.* The instant case does not involve a negligent act or omission by an employee. The Airport Authority’s employees did not negligently erect the sign at issue. The Airport Authority itself, as an entity, took affirmative and intentional steps to erect the sign within the right-of-way. We therefore find that T.C.A. § 29-20-205(2) – addressing, as it does, the acts of employees – does not apply to the facts before us.

We further conclude that the provisions of the GTLA, although they grant immunity to governmental entities under certain circumstances, do not in any way shield the Airport Authority from the injunctive relief ordered by the trial court. The case law interpreting the application of the GTLA makes an important distinction between actions for *damages* against a governmental entity and actions for *injunctive relief* against a governmental entity. See **Sanders v. Lincoln County**, No. 01A01-9902-CH-00111, 1999 WL 684060, at *5-6 (Tenn. Ct. App. W.S., filed September 3, 1999). For example, in **Jones v. Louisville & Nashville R.R. Co.**, 1986 WL 3435 (Tenn. Ct. App. M.S., filed March 21, 1986), we held that

an action for damages of any sort, to the person or to property, arising from negligence or from conditions constituting a nuisance is within the [GTLA] and the procedural requirements of the act must be met in order to maintain the action. T.C.A. § 29-20-201(a) provides in part that “all governmental entities shall be immune from suit for any injury which result from the activities of said governmental entities.” T.C.A. § 29-20-102(4) defines “injury” to mean “death, injury to a person, damages to or loss of property or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.” Therefore, we conclude that any action for *damages* must be brought under the provisions of the act.

However, we are not persuaded to go the final step. Prior to the passage of the [GTLA], a county was apparently immune from a suit for damages based on nuisance so long as the county was performing governmental functions. **Buckholtz v. Hamilton County**, 180 Tenn.

263, 174 S.W.2d 455 (1943); *Odil v. Maury County*, 175 Tenn. 550, 136 S.W.2d 500 (1940). That immunity, however, did not extend to actions brought to abate a nuisance created by the county, even where the county was acting in its governmental capacity. *Jones v. Knox County*, 205 Tenn. 561, 327 S.W.2d 473 (1959). *There is nothing in the [GTLA] which removes the inherent power of a court of equity to abate a nuisance created by a governmental entity.* Therefore, we hold that the action to abate the alleged nuisance in this case is not governed by the procedural requirements of the act. Such an action may be brought under the inherent power of the Chancery Court.

Id., at *2-3 (emphasis added). The reasoning of this case as it pertains to nuisances applies with equal force to the trespass present in this case. The GTLA does not preclude an injunction to address a governmental entity's trespass.

In the instant case, the trial court ordered the Airport Authority, along with the Museum, to remove the sign at issue. We can find nothing in the provisions of the GTLA that would prohibit the trial court from ordering this equitable relief against the Airport Authority.

VI.

The judgment of the trial court is hereby affirmed. This case is remanded for such further proceedings, if any, as may be required, consistent with this opinion. Costs on appeal are taxed one-half to the appellant, Gatlinburg Airport Authority, Inc., and one-half to the appellant, Tennessee Museum of Aviation, Inc.

CHARLES D. SUSANO, JR., JUDGE